

INVIGORATING THE ROLE OF THE IN-HOUSE LEGAL ADVISOR AS STEWARD IN ETHICAL CULTURE AND GOVERNANCE AT CLIENT- BUSINESS ORGANIZATIONS: FROM 21ST CENTURY FAILURES TO TRUE CALLING

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1. Rising from 21st Century Failures in Ethical Culture and Governance at Business Organizations—An Introduction

As a composite, American business organizations are a moral failure. Public trust in business has reached a forty year low.¹ The current global economic downturn is, “at its core, a crisis of trust.”² Characterized by former NASDAQ chairman Bernard Madoff, Satyam CEO Byrraju Ramalinga Raju, Stanford Financial Group CEO Sir Robert Allen Stafford, and Petters Group CEO Tom Petters, too many executives and their supporting cast of often-acquiescent in-house attorneys have pawned public trust for large salaries, big cars, supersized corner offices, and the McMansion. Viewed intragenerationally, these fallen leaders were highly ambitious individuals caught up in a career phase defined by self-interest, status-seeking, and shortsighted wealth acquisition. As a consequence, business leaders have not only undermined the public’s trust, but have prompted a global financial crisis and recession, damaging the viability of business enterprise, the livelihood of employees, shareholders, other stakeholders, and global investor confidence.

Where did these business leaders go wrong? Certainly, their mothers taught them better. Why have so many business executives violated the moral tenet “Do the Right Thing,” a variation “Do Unto Others as You Would Have Them Do Unto You: The Golden Rule taught in many families?”³ Although corporations such as credit card

1. Harrisinteractive.com, *The Harris Poll Annual Confidence Index Rises 10 Points*, Mar. 5, 2009, <http://www.harrisinteractive.com> (On March 5, 2009, the Harris Poll released its annual Confidence Index, a forty-year old longitudinal study. The Confidence Index surveyed 1,010 adults via telephone between February 10, 2009 and February 15, 2009. When asked about their confidence in Wall Street, only 4 percent of surveyed participants indicated that they possessed a “great deal of confidence” in Wall Street. This level represents an all-time low for the industry); Neil Hamilton, *Levels of Public Trust in Business, Government and the Gatekeeping Professions*, MINN. LAW., Aug. 7, 2009, at A-7 (Professor Hamilton cites a Harris Poll study illustrating that “levels of public trust in business [have] experience[ed] a significant decline”).

2. Arthur W. Page Soc’y, The Roundtable Inst. for Corporate Ethics, *Executive Summary: The Dynamics of Public Trust in Bus.—Emerging Opportunities for Leaders, A Call to Action to Overcome the Present Crisis of Trust in Bus.* 3, http://www.corporate-ethics.org/pdf/public_trust_in_Business.pdf (last visited Nov. 4, 2009).

3. Richard T. Kinnier, Jerry L. Kernes and Therese M. Dautheribes, *A Short List of Universal Moral Values*, 45 COUNSELING AND VALUES 4, 5 (2000) (“Do unto

aficionado Capital One Financial have adopted “Do the Right Thing” as a paramount corporate value,⁴ too many executives and their internal gatekeepers have become too preoccupied with “What’s in your Wallet?”⁵ The walk does not match the talk. Nonetheless, if we assume that these business leaders possessed at least a scintilla of moral scruples, perhaps they merely compartmentalized their personal moral values to “Do the Right Thing” to family-filled Saturdays or ceremonial Sundays. As a result, the absence of moral considerations in “Monday through Friday” corporate culture has turned America and its Western business culture into a “nation of privatized morality . . . [where] spirituality [became] a private pursuit with no legitimate role in the public domain.”⁶ Public trust and confidence in the capital markets have fallen with our morally bankrupted business leaders, taking us all down with them.

At this juncture, 21st Century business needs moral reformation. Business organizations and the legal profession—Corporate America’s legal enabler and primary governance gatekeeper—must lead the charge. Unfortunately, neither the business sector nor the legal profession has “responded with an honest self-assessment or a proposal to rebuild the public’s trust.”⁷ Nonetheless, the markets and the general public cannot continue to tolerate anything short of a genuine response. Toward a legitimate response, business organizations must disavow their previous myopic preoccupation with mere short-term maximization of share price, embarking upon a more holistic focus on long-term wealth creation that weighs the rewards

others as you would have them do unto you” is affectionately known as the Golden Rule).

4. Capital One Corporate Values, <http://www.capitalone.com/careers/organization/values.php> (last visited July 2009).

Capital One Financial’s Corporate Values:

Every choice we make at Capital One is guided by our Values: Excellence—defines the way we perform as individuals, teams, and an organization. Do the Right Thing—describes how we interact with each other and our customers. Our Values serve as the cornerstone of our culture and how our associates interact with each other and our customers. Our Values set Capital One apart from other companies and serve as a measure of our success.

Id.

5. Capital One’s trademarked slogan.

6. Lindsay J. Thompson, *Moral Leadership in a Postmodern World*, 11 J. LEADERSHIP & ORG. STUDIES 27, 28 (2004).

7. Hamilton, *supra* note 1.

and risks for all stakeholders. In *Institutionalizing Ethics in a Global Economy*, Ken Goodpaster remarks:

The value of a business to society is the wealth and employment it creates To create such value, a business must maintain its own economic health and viability, but survival is not a sufficient goal Businesses have a role to play in improving the lives of all their customers, employees, and shareholders Suppliers and competitors . . . should expect businesses to honor their obligations in a spirit of honesty and fairness. As responsible citizens of the local, national, regional and global communities in which they operate, businesses share a part in shaping the future of those communities.⁸

Reforming 21st Century business organizations requires that business executives and their internal gatekeepers—particularly their in-house legal advisors—deprivatize their personal moral values, incorporating moral considerations within “Monday through Friday” corporate culture. As a prerequisite, each executive and legal advisor as potential moral change agent must engage in inward self-reflection, inwardly locating her “internal moral compass”—a deeply personal conscience that “guide[s] . . . decisions based on morals”⁹ Through an internal moral compass based on fundamental moral values, each moral change agent inaugurates the first stage of corporate efforts to create a more holistic multiple stakeholder-centric approach to long-term wealth creation. In *True North: Discover Your Authentic Self*, Bill George remarks:

True North is the internal compass that guides you successfully It represents who you are as a human being at your deepest level. It is your orienting point . . . that helps you stay on track as a leader. Your True North is based on what is most important to you, your most cherished values . . .

. . .¹⁰

An internal moral compass becomes each executive and in-house legal advisor’s admission ticket to enter into a workplace social

8. Ken Goodpaster, *Institutionalizing Ethics in a Global Economy*, <http://www.helleniccomserve.com/goodpaster.html> (last visited July 21, 2009).

9. WEBSTER’S NEW MILLENNIUM DICTIONARY OF ENGLISH, <http://dictionary.reference.com/browse/moral+compass> (last visited July 21, 2009) (defining moral compass).

10. BILL GEORGE, *TRUE NORTH: DISCOVER YOUR AUTHENTIC SELF* xxiii (2007).

contract to discover “moral solidarity,” an institutional moral framework needed “to engage in meaningful, authentic moral dialogue and discernment” in enterprise, strategic, and tactical business decisions.¹¹ Through collective moral engagement, business becomes a “fully human activity [where] ethics provide not just an abstract set of principles or side constraints . . . but the very framework of business activity.”¹² In *Moral Leadership in a Postmodern World*, Lindsay J. Thompson remarks:

Leadership, the exercise of social power (and often attendant economic and political power), is fundamentally a moral endeavor. There is an inescapable moral dimension to the exercise of power, whether or not it is formally acknowledged. Effective leaders are able to engage with others in building, by example and constructive effort, an environment within which individuals and groups are free and encouraged to discern and actualize the right and the good in fulfillment of shared goals, values and purpose. While leadership may not be framed in terms of morality or ethics, a sense of moral solidarity is at the heart of successful enterprise.¹³

Through collective moral solidarity, each moral change agent’s “True North” coalesces into a shared corporate conscience—a culture of “shared beliefs, norms, traditions and values of the members of an organization [that helps a business organization] do [the right] things”¹⁴ Corporate conscience urges business organizations and their employees to operationalize “Do the Right Thing” for all stakeholders—beyond mere legal, compliant, or competitive considerations. Ken Goodpaster shares this sentiment in *Conscience and Corporate Culture*: “[C]orporate conscience is not in the end a matter of external compliance or competitive advantage; it is a matter of internal self-assessment and improvement.”¹⁵

11. Thompson, *supra* note 6, at 11.

12. Richard C. Warren, *Practical Reason in Practice: Reflections on a Business Ethics Course*, 37 J. EDUC. AND TRAINING 14, 20 (1995).

13. Thompson, *supra* note 6, at 11.

14. Lynn D. Lieber, *In-House Counsel Can Help Create an Ethical Corporate Culture*, WORKPLACE ANSWERS INC., ¶ 4, Jan. 29, 2007, <http://www.workplaceanswers.com/News/In-House-Counsel-Can-Help-Create-an-Ethical-Corpor218.aspx>.

15. Ken E. Goodpaster, *Conscience and Corporate Culture*, THE MAG. OF THE OPUS COLL. OF BUS., Spring 2005, at 3 (2005).

Although many business organizations frame and articulate corporate conscience through written policies, ethics codes, and compliance management programs, policies, codes, and compliance programs alone are inadequate to operationalize an ethical corporate conscience. A stewardship ethics must accompany such protocols. Ethical stewardship involves “honoring duties owed to employees, stakeholders and society in the pursuit of long-term wealth creation.”¹⁶ Ethical stewardship takes shape when a business organization’s primary internal gatekeepers incorporate moral considerations within their functional, administrative, or advisory roles as enablers to enterprise, strategic, and tactical business decisions. Gatekeepers as ethical stewards help prevent misconduct particularly in difficult high-risk/high-reward business decisions. In *Stewardship: Choosing Service Over Self-Interest*, Peter Block notes:

[S]tewardship has the potential to reintegrate parts of ourselves [It] focuses our attention on aspects of our workplaces that have been most difficult to change Stewardship is the umbrella idea which promises the means of achieving fundamental change in the way we govern our institutions Stewardship is . . . the willingness to be accountable for the well-being of the larger organization [and other stakeholders] by operating in service, rather than in control, of those around us. Stated simply, it is accountability without control or compliance.¹⁷

Reforming 21st Century business organizations requires that business organizations invigorate the role of the in-house legal advisor from “mere legal technician” to simultaneous legal gatekeeper and ethical steward. The in-house legal advisor can no longer function as a “mere legal technician”—an advisor narrowly confined to providing mere blackletter legal advice. The in-house legal advisor must serve as both technical legal advisor and steward for ethical culture and governance, incorporating moral considerations—when and where relevant—in corporate legal representation. This notion of the invigorated in-house legal advisor fosters a more ideal ethical “gold standard”—exceeding Model Rules of Professional Conduct Rule 2.1’s

16. Cam Caldwell, Linda A Hayes, Ranjan Karri & Patricia Bernal, *Ethical Stewardship – Implications for Leadership and Trust*, 78 J. BUS. ETHICS 153, 153 (2008).

17. PETER BLOCK, *STEWARDSHIP: CHOOSING SERVICE OVER SELF-INTEREST* xix-xx (1995).

optional ethical stewardship ethic, which gives the legal advisor rendering "independent professional judgment and . . . candid advice" the *option* to "refer not only to [the] law but to other considerations such as moral . . . factors that may be relevant to the client's situation."¹⁸

Historically, some executives have supported this invigorated "gold standard" of ethical stewardship. In *Ethical Leadership in the Sarbanes-Oxley World*, Neil Hamilton and Marlon Cush's remarks imply that some executives have previously supported the notion of the in-house advisor as simultaneous legal advisor and resourceful ethical steward:

The American Corporate Counsel Association, the largest national bar association composed solely of in-house counsel, surveyed chief executive officers (CEO), chief operating officers and chief financial officers in 2001 regarding the roles corporate counsel are expected to play. The top four roles in order-of-importance were:

- educator regarding legal issues;
- ethics advisor;
- sounding board/confidant; and
- compliance officer.¹⁹

In a more anecdotal study, former Medtronic CEO Thomas Holloran surveyed five chief executive officers to identify what chief executive officers expect from their legal advisors. Holloran found that executives expect in-house legal advisors to possess, among several other virtues, the honesty and courage to "give straight advice," "confront management when it is wrong," educate executives on ethical enforcement, and serve as an example of ethical conduct.²⁰

To reform business organizations beyond 21st Century moral failures, the role of the legal advisor within in-house legal representation must shift from the mere legal technician to the simultaneous

18. MODEL R. PROF. CONDUCT, R. 2.1 (2003). Model Rule 2.1 defines the role of attorney as counselor and advisor. "In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer *may* refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation." *Id.* (emphasis added).

19. Neil Hamilton & Marlon Cush, *Ethical leadership in the Sarbanes-Oxley world*, MINN. LAW., June 19, 2006, <http://www.stthomas.edu/ethicalleadership/resources/publications/mnlawyer1.html>.

20. Neil Hamilton, *Counseling the Post-Enron Corporation Using the Lawyer's Independent Professional Judgment*, 14 PROF. LAW. 24, 25 (2003).

technical legal gatekeeper and ethical steward. This article seeks to transform contemporary thinking about the role and characteristics of the in-house legal advisor in ethical culture and governance, enabling client-business organizations to restore public trust and global investor confidence.

A. *From Far South to True North: Toward the In-House Legal Advisor as “Institutional Moral Compass”*

The in-house legal advisor as simultaneous legal gatekeeper and ethical steward becomes, in effect, her client-business organization’s “institutional moral compass.” As a front-line moral conscience in corporate legal representation, the invigorated in-house legal advisor combines ethical considerations with technical legal oversight, steering the business organization toward prudent business conduct.

Invigorating the role of in-house legal advisor from mere legal technician is highly warranted. Indeed, Western business has navigated too far south from “True North,” creating a “moment of critical mass.”²¹ The 24-hour news cycle bombarded the general public with Bernard Madoff, Tom Petters, Robert Allen Stafford, and Ramalinga Raju, who allegedly deceived investors through massive Ponzi schemes and/or gross accounting irregularities. Headlines and blogs pounded the scandals at AIG, General Motors, and Bear Stearns, whose executives failed to tame their aggressive high-risk, short-term wealth creation business models, prompting a global financial crisis and recession.

However, business executives were not the only culprits in the global financial fallout. In *Former Enron In-House Counsel Look Backward . . . and Forward*, author David Hechler remarks: “After the scandal . . . [a]mid boatloads of details about related-party and off-balance sheet transactions, an old question is likely to resurface: ‘Where were the lawyers?’”²²

Where were the in-house lawyers in Madoff, Petters, Stafford, and Raju? Where were the in-house legal advisors at AIG, General Motors, and Bear Stearns? Were they simply oblivious to executive

21. MALCOLM GLADWELL, *THE TIPPING POINT: HOW LITTLE THINGS CAN MAKE A BIG DIFFERENCE* 12 (2001).

22. David Hechler, *Former Enron In-House Counsel Look Backward...and Forward, One Lesson Learned*, Corporate Counsel, Feb. 22, 2006, <http://www.law.com/jsp/ihc/PubArticleIHC.jsp?id=1140516315050>.

misconduct? Were they aware of possible misconduct, turning a blind eye for fear of reprisal? Or were they merely entangled in a web of legal “technician-hood,” limiting legal representation to mere technical legal advice?

Questioning the culpability of in-house legal advisors in recent scandals is fair game. In-house lawyers employed at client-business organizations involved in questionable conduct must share culpability for their executives’ ethical failures and miscues. In *A New Role for Lawyers? The Corporate Counselor After Enron*, Robert W. Gordon remarks:

It is clear that the advice both in-house lawyers and outside law firms gave to the managers of Enron and other companies like it was instrumental in enabling those managers to cream huge profits for themselves while brining economic ruin to investors, employees and the taxpaying public. Although the lawyers were not principally responsible for these acts of waste and fraud, their advice was a contributing (and often necessary) cause of those acts. Such fraud could have been carried out without the lawyers’ active approval, passive acquiescence, or failure to inquire and investigate.²³

In *Ethical Leadership in the Sarbanes-Oxley World*, Neil Hamilton and Marlon Cush assert that in-house legal advisors functioning as mere legal technicians deserve culpability for recent scandals:

It is apparent that many lawyers representing these corporations while criminal acts and fraud were occurring acted in a limited role as legal technicians. They counseled and advocated on narrow issues . . . at the outer limits of zealous advocacy in pursuit of maximum profit for the client and the lawyer.

The legal technician celebrates the craft of lawyering but divorces the skills of the craft from the profession’s transcendental purpose to serve justice. The skills of the craft focus simply on serving client and lawyers’ self-interest. Market recognition through income becomes the benchmark of success for the technician. Even if a legal technician’s narrow technical role and outer limits of good faith advocacy are not themselves criminal or fraudulent acts, the public views this

23. Robert W. Gordon, *A New Role for Lawyers? The Corporate Counselor After Enron*, 35 CONN. L. REV. 1185, 1190 (2003).

conduct as a breach of the unwritten social contract of the profession with society (where the profession promises to balance roles as a representative of clients, officer of the legal system and public citizen responsible for justice, in return for autonomy to regulate itself through peer review).²⁴

As an effective corrective action to executives and in-house legal advisors' joint culpability, business organizations must "institute far reaching changes . . . [that are] ethical in character [toward] a new stage in the evolution of market capitalism."²⁵ In *Profit with Honor: The New Stage of Market Capitalism*, Daniel Yankelovich asserts:

[T]he time has come for market capitalism in the United States to advance to a new stage of enlightened self-interest. American business needs to develop a new ethic—a coherent set of social norms—both to counteract the forces leading to the scandals and to meet the challenges of the global economy that call upon business to take on many new responsibilities . . . we [] need a higher standard of ethical norms . . . "stewardship ethics" . . . [A] great society is one which its business, political, and civic leaders . . . exercise their leadership within a frame of stewardship ethics.²⁶

Through this new stewardship ethics, an in-house legal advisor evaluating business initiatives for legal risks as a front-line advisory gatekeeper could help prevent executive ethical misconduct.

Yankelovich remarks: "The changes needed to stop the scandals must not only target the compensation policies and corporate governance of individual companies, they must also include changes required of the gatekeepers of business . . . [especially] business lawyers

. . . .²⁷

As an enabling professional, the in-house legal advisor could withhold his consent or approval, preventing the business organization from completing a transaction or achieving some desired objective.²⁸

24. Neil Hamilton & Marlon Cush, *Ethical Leadership in the Sarbanes-Oxley World*, MINN. LAW., June 19, 2006, <http://www.stthomas.edu/ethicalleadership/resources/publications/mnlawyer1.html>.

25. DANIEL YANKELOVICH, *PROFIT WITH HONOR: THE NEW STAGE OF MARKET CAPITALISM* 2 (2006).

26. YANKELOVICH, *supra* note 25, at 2.

27. *Id.* at 141.

28. John C. Coffee, Jr., *The Attorney as Gatekeeper: An Agenda for the SEC* 8 (COLUM. L. & ECON., Working Paper No. 221, 2003).

In effect, the in-house legal advisor becomes a “reputational intermediary” who pledges his reputational capital to evaluate and monitor corporate activity.²⁹ As a simultaneous front-line legal gatekeeper and ethical steward, the in-house legal advisor becomes a more holistic overseer of an organization's decisions from “planning to fruition.”³⁰

Without question, the in-house legal advisor must honor its dual role as front-line legal gatekeeper and ethical compass. If in-house attorneys in previous scandals were committed to ethical considerations within their gatekeeper roles, their client-business organizations could have averted executive misconduct. Yankelovich continues:

[I]n the recent spate of scandals the gatekeepers compromised the values of their professions in pursuit of their own financial self-interest and that “the failure of . . . gatekeepers was a recurrent theme in the business scandals.” In effect . . . the scandals represent a double failure: “The managers failed; and then the gatekeepers failed as well The number and magnitude of corporate wrongdoing cases would have been almost inconceivable had these professionals behaved consistently with their traditional roles and the public’s legitimate expectations.”³¹

Indeed, the in-house legal advisor as simultaneous front-line legal gatekeeper and ethical steward is a timely notion. However, some members of the legal profession resist efforts to place them at the forefront of ethical culture and governance. In *Evolving Issues for Corporate Lawyers and In-House Counsel*, John Dzienkowski remarks:

Despite significant changes in the number and role of in-house counsel in providing legal services to corporate America[,] the organized legal profession has largely refused to shape its ethics rules or offer special guidance to the special problems encountered by lawyers who are full-time employees of corporations or other business entities Moreover, the common law generally continues to characterize in-house lawyers as employees-at-will that can be fired despite the efforts of such counsel to comply with professional ethics

29. Coffee, *supra* note 28, at 2.

30. Rutheford B Campbell, Jr. & Eugene R. Gaetke, *The Ethical Obligation of Transactional Lawyers to Act as Gatekeepers*, 56 RUTGERS L. REV. 9, 14 (2003).

31. YANKELOVICH, *supra* note 25, at 141.

rules and attempt to make his employer operate within the boundaries of the law.³²

In *A New Role for Lawyers? The Corporate Counselor After Enron*, Robert W. Gordon describes more vehement resistance:

Even if lawyers [are engaged in any wrongdoing or ethical lapses], however, it is difficult and exceedingly rare to hold corporate lawyers . . . liable for frauds committed by their clients' managers

The organized bar is determined to keep things that way. After every wave of business failures resulting from corporate fraud, pressures mount to revise the rules to make lawyers . . . better monitors—or at least less amiably cooperative enablers—of managers' misconduct. The lawyers . . . sometimes lose a point or two, but their professional organizations and lobbies usually succeed in thwarting the reforms.³³

Despite such resistance, Rutheford B Campbell, Jr. and Eugene R. Gaetke in *The Ethical Obligation of Transactional Lawyers to Act as Gatekeepers* urges:

The Enron episode and its aftermath also make clear the stakes involved. A range of corporate constituencies suffered from the misdeeds of the managers at Enron, including shareholders, employees, and creditors. On a broader scale, the revelations of managers' deliberate efforts to hide their company's debt and inflate its profitability shook investors' confidence in the markets' valuation of corporate stock generally. To the extent transactional lawyers, acting as effective gatekeepers, can play a part in discouraging such misconduct by managers, the societal consequences would be substantial. Given the importance of the role transactional lawyers play in furthering their corporate clients' conduct, increasing the demands on lawyers as gatekeepers would accomplish more than elevating the profession's own standards of behavior; it would also serve to reduce the level of corporate misconduct itself.³⁴

32. John Dzienkowski, *Evolving Issues for Corporate Lawyers and In-House Counsel*, 2-3 (2003) (unpublished manuscript, on file with University of Texas Continuing Legal Education).

33. Gordon, *supra* note 23, at 1188.

34. Campbell & Gaetke, *supra* note 30, at 15.

In *In-House Counsel Can Help Create an Ethical Corporate Culture*, Lynn Lieber answers this call toward an expanded role for the in-house legal advisor:

Corporate counsels' ethical obligations are primarily seen as directing the corporation to comply with the Sarbanes-Oxley Act and the Federal Sentencing Guidelines . . . [while] . . . the more amorphous concept of corporate "culture" has been left to the auspices of human resources. New empirical evidence suggests that corporate culture plays a defining role in whether an organization conducts business in an ethical manner—and that corporate counsel need to be part of assessing and changing that culture, when necessary.

After the fall of Enron and other ethical scandals, most corporations enacted a code of conduct and distributed it to their employees. Some corporations have undertaken costly internal audits by ethics experts. Corporate counsel[s] have instituted elaborate compliance programs, auditing committees and review boards. So why are corporate ethical violations still in the news everyday . . . ?

Fundamentally . . . very few organizations have actually changed their inherent business culture to be one where ethical violations of any kind are simply not tolerated. This change can only come from the top down and must actively involve employees at all levels of the organization, with corporate counsel leading the charge.³⁵

The invigorated in-house legal advisor plays a highly active role in ethical culture and governance, preventing potential ethical indiscretions. Because the in-house legal advisor often participates as an enabler in corporate decision-making, the legal advisor has direct access to decisionmakers to raise concerns. Should a decisionmaker engage in conduct likely to result in substantial injury to the organization, the in-house legal advisor—as counsel to the organization³⁶ and as an officer of the court in tribunal matters³⁷—has an obligation to

35. Lieber, *supra* note 14, ¶¶ 1-3.

36. MODEL RULES OF PROF'L CONDUCT R. 1.13(a) (2003). "A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents." *Id.*

37. Model Rule 3.3, as explained in Comment 2, "sets forth the special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process." MODEL RULES OF PROF'L CONDUCT R. 3.3 cmt. 2.

persuade the decisionmaker to “Do the Right Thing,” protecting the business organization's assets, share price, and reputation with stakeholders and society at large. Comment 3 of Model Rules of Professional Conduct Rule 1.13 reinforces this sentiment:

When constituents of the organization make decisions for it, the decisions ordinarily must be accepted by the lawyer even if their utility or prudence is doubtful. Decisions concerning policy and operations, including ones entailing serious risk, are not as such in the lawyer's province. [Model Rule 1.13(b)]³⁸ makes clear, however, that when the lawyer knows that the organization is likely to be substantially injured by action of an officer or other constituent that violates a legal obligation to the organization or is in violation of law that might be imputed to the organization, the lawyer must proceed as is reasonably necessary in the best interest of the organization. As defined in Rule 1.0(f),³⁹ knowledge can be inferred from circumstances, and a lawyer cannot ignore the obvious.⁴⁰

Model Rule 2.1, Comment 1 explains further:

A client is entitled to straightforward advice expressing the lawyer's honest assessment. Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront. In presenting advice, a lawyer endeavors to sustain the client's morale and may put advice in as acceptable a

38. MODEL RULES OF PROF'L CONDUCT R. 1.13(b). Rule 1.13(b) provides: If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances to the highest authority that can act on behalf of the organization as determined by applicable law.

Id.

39. MODEL RULES OF PROF'L CONDUCT R. 1.0(f). “‘Knowingly,’ ‘known,’ or ‘knows’ denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.” *Id.*

40. *Id.* R. 1.13 cmt. 3.

form as honesty permits. However, a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.⁴¹

The invigorated in-house legal advisor as an institutional moral compass can steer internal decisionmakers toward ethical business conduct. In kind, internal decisionmakers should rely on the in-house legal advisor not as a mere legal technician limited to strict interpretation of legal dos and don'ts, but as a candid, persuasive strategic legal gatekeeper and steward to resolve ethical dilemmas in business matters.

B. Rules are Not Enough: Model Rules, Sentencing Guidelines, and Federal Laws

Based on the author's experience as a former corporate governance and regulatory compliance leader, some business organizations have relied on their in-house legal advisors for mere technical interpretation of laws, regulations, and guidelines, failing to instill an ethical stewardship ethic in their legal gatekeepers. In some instances, corporate general counsels and senior business executives have discouraged their in-house attorneys from rendering anything beyond mere technical legal advice. An in-house attorney at a major Fortune 500 corporation once remarked that he makes every effort to avoid non-technical legal advice and ethical recommendations for fear of unwittingly undermining the attorney-client privilege and his chances at executive sponsorship for promotion. Meanwhile, society continues to witness both minimal ethical conduct and outright ethical misconduct among business leaders.

To curb ethical misconduct in business organizations, an in-house legal advisor must complement technical legal advice with relevant ethical considerations—moral, political, economic, or otherwise—that enable business leaders to make prudent decisions. This is the hallmark of ethical stewardship in in-house legal practice. Without this stewardship ethic, business leaders and in-house legal advisors may unwittingly “game the code”: stretching and bending laws and regulations at the expense of technical regulatory compliance, stakeholders' interests, and larger societal interest including public trust and investor confidence.

41. *Id.* R. 2.1 cmt. 1.

Unarguably, the in-house lawyer must adhere to the ethical rules of professional conduct binding on all licensed attorneys. Moreover, the in-house lawyer must abide by Sarbanes-Oxley, Federal Sentencing Guidelines for Organizations, and the SEC Final Rule binding on attorneys representing publicly-traded corporations. However, corporate scandals have shown that mere compliance with rules, guidelines, and laws alone are not sufficient to promote ethical culture and governance in client-business organizations.

In *Codes and Virtues: Can Good Lawyers be Good Ethical Deliberators*, Heidi Li Feldman argues that blackletter ethical codes are limited in their ability to inspire ethical culture and governance:

Regardless of its specific contents, any black letter statutory codification regulating lawyers' conduct will be flawed as an instrument of ethics for lawyers Typically statutory prohibitions and permissions are likely to stunt sentimental responsiveness, a key feature of good ethical deliberation. Additionally, a certain technocratic mode of legal analysis heightens this tendency. Although other styles of lawyering might better engender sentimental responsiveness, statutory codes of lawyers' ethics do not invite this style⁴²

Nonetheless, ethical stewardship must accompany federal laws, guidelines, and ethical rules to help business organizations discern the gray area between prudent action and outright unethical conduct. In *Working Without a Net: The Sociology of Legal Ethics in Corporate Litigation*, Mark Suchman concludes:

Professional ethics must allow enough room for real life, and as a result, usually offer only a symbolic display of vacant platitudes or a minimalist "floor" between there merely sleazy and the undeniably corrupt. Either way, however, an ethical profession requires more than just professional ethics. It requires a sense of right and wrong—estimable and reprehensible practice—that rises above the letter of the rules . . . in the face of real-world challenges.⁴³

42. Heidi Li Feldman, *Codes and Virtues: Can Good Lawyers be Good Ethical Deliberators*, 69 S. CAL. L. REV. 885, 885 (1996).

43. Mark C. Suchman, *Working Without a Net: The Sociology of Legal Ethics in Corporate Litigation*, 67 FORDHAM L. REV. 837, 837 (1999).

(1) *The Model Rules of Professional Conduct*

The American Bar Association Model Rules of Professional Conduct (Model Rules) articulate the ethical “rules of reason” governing legal representation especially in corporate legal representation.⁴⁴

Under Model Rule 1.13(a), an attorney “employed . . . by an organization represents the organization.”⁴⁵ Although an attorney may regularly advise business leaders and staff within the client-organization, the attorney’s actual client is the client organization, not an individual decisionmaker. Under Model Rule 2.1, the in-house legal advisor must “exercise independent professional judgment and render candid advice . . . [with the option to] refer not only to [the] law but to other considerations such as moral, economic, social and political factors that may be relevant to the client’s situation.”⁴⁶ Model Rule 2.1 incorporates an optional stewardship ethic, only requiring the in-house legal advisor to exercise independent technical legal judgment and candid legal advice.

Under Model Rule 1.4(a), the in-house legal advisor must:

- (2) reasonably consult with the client about the means by which the client’s objectives are to be accomplished;
- (3) keep the client reasonably informed about the status of the matter;
- (4) promptly comply with reasonable requests for information; and
- (5) consult with the client about any relevant limitation on the lawyer’s conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.⁴⁷

Under Model Rule 1.13(b), the in-house legal advisor must “proceed as is reasonably necessary in the best interest of the organization”—especially when a business executive or other decisionmaker “refuses to act in a matter related to the representation that is . . . a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization.”⁴⁸

44. MODEL RULES OF PROF’L CONDUCT pmbi. § 14.

45. *Id.* R. 1.13(a).

46. *Id.* R. 2.1.

47. *Id.* R. 1.4(a).

48. *Id.* R. 1.13(b).

Model Rule 1.2(d) prohibits a legal advisor from counseling “a client to engage, or assist[ing] a client, in conduct that the lawyer knows is criminal or fraudulent”⁴⁹ Moreover, under Model Rule 1.2(d), a legal advisor may “discuss the legal consequences of any proposed course of conduct with a client and . . . counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.”⁵⁰ However, without an appropriate stewardship ethic, an acquiescent in-house legal advisor might unwittingly permit executive misconduct, at the expense of the client-business organization’s interests, assets, and reputational standing.

Model Rules 1.13(a), 2.1, 1.4(a), 1.13(b), and 1.2(d) represent the in-house legal advisor's bare-minimum ethical obligation as legal counsel to the client-business organization.⁵¹ Nonetheless, these Rules are not fully exhaustive of a “gold standard” stewardship ethic incorporating “True North”—an internal moral compass needed to lead client-business organizations to “Do the Right Thing” in the interest of long-term wealth creation, stakeholder stability, public trust, and global investor confidence. To invigorate the role of the in-house legal advisor in ethical culture and governance, business organizations must foster a “gold standard” expectation for their in-house legal advisors—beyond mere legal technical advice. Each client-business organization must expect each advisor to always incorporate, where relevant, ethical considerations in in-house corporate legal representation.

(2) *The Federal Sentencing Guidelines for Organizations*

Under the Federal Sentencing Guidelines for Organizations, U.S. Congress requires organizations to create “an effective compliance and ethics program.”⁵² Specifically, the Sentencing Guidelines provides the following:

49. MODEL RULES OF PROF’L CONDUCT R. 1.2(d).

50. *Id.*

51. Although Rule 2.1 urges legal advisors towards a “gold-standard” aspirational stewardship ethic (i.e., encouraging lawyers to incorporate moral considerations, when relevant, within the scope of legal representation—beyond mere legal technicianship), the Model Rules as a whole represent a minimum floor of ethical conduct below more aspirational aims.

52. Federal Sentencing Guidelines for Organizations, *Effective Compliance and Ethics Program* § 8B2.1(a) (2008).

To have an effective compliance and ethics program, for purposes of subsection (f) of §8C2.5 (Culpability Score) and subsection (c)(1) of § 8D1.4 (Recommended Conditions of Probation - Organizations), an organization shall—

- (1) Exercise due diligence to prevent and detect criminal conduct; and
- (2) Otherwise promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law.

Such compliance and ethics program shall be reasonably designed, implemented, and enforced so that the program is generally effective in preventing and detecting criminal conduct.⁵³

In *The Federal Sentencing Guidelines for Organizations: A Decade of Promoting Compliance and Ethics*, retired U.S. Eighth Circuit Judge and former U.S. Sentencing Commission Chair Diane E. Murphy applauds the Federal Sentencing Guidelines for Organizations as an unparalleled mechanism to curb executive misconduct:

[T]he organizational guidelines provide incentives for far reaching compliance programs [B]y promoting compliance and ethics programs, the organizational guidelines not only provide incentives for substantial changes in organizational behavior, but also further some of the main goals of the Sentencing Reform Act: the prevention and deterrence of criminal conduct.

In addition, the organizational guidelines have also made responsible individuals in organizations aware of potential personal liability if they fail to support and involve themselves in programs and procedures designed to prevent and deter violations of the law.⁵⁴

Judge Murphy deems "far reaching compliance programs" as "effective" if organizations ensure that:

- (1) Compliance standards and procedures [are] established to deter crime.
- (2) High-level personnel [are] involved in oversight.

53. *Id.*

54. Diana E. Murphy, *The Federal Sentencing Guidelines for Organizations: A Decade of Promoting Compliance and Ethics*, 87 IOWA L. REV. 697, 699 (2002).

- (3) Substantial discretionary authority [is] carefully delegated.
- (4) Compliance standards and procedures [are] communicated to employees.
- (5) Steps [are] taken to achieve compliance in establishment of monitoring and auditing systems and of reporting systems with protective safeguards.
- (6) Standards [are] consistently enforced.
- (7) [V]iolations [are accompanied by] appropriate responses, which may include modification of compliance standards and procedures and other preventive measures.⁵⁵

Nonetheless, the Federal Sentencing Guidelines alone cannot ensure ethical culture and governance in business organizations. Business organizations must augment compliance programs with an uncompromising ethical stewardship ethic within the in-house legal advisor as simultaneous legal gatekeeper and ethical steward.

(3) *Sarbanes-Oxley and the SEC Final Rule*

In 2002, the United States Congress instituted federal ethical governance laws binding on attorneys practicing in publicly traded corporations. The most notable is the Sarbanes-Oxley Act (Sarbanes-Oxley). Sarbanes-Oxley constituted “the most dramatic expansion of federal regulatory power over corporate governance since the New Deal.”⁵⁶ Sarbanes-Oxley sought to “reverse a trend that has been pronounced in American business over the last thirty years or so—the dominance of finance over management.”⁵⁷ In *The Sarbanes-Oxley Act and the Reinvention of Corporate Governance?*, Lawrence E. Mitchell remarks:

[Since the 1950s and 1960s], the rise and dominance of finance has forced corporate business management to take a backseat to corporate finance, with the result that the business of business is managing finance, driven by the stock

55. *Id.* at 704.

56. Carl W. Mills, *Breach of Fiduciary Duty as Securities Fraud: SEC v. Chancellor Corp.*, 10 FORDHAM J. CORP. & FIN. L. 439, 488 (2005) (citing Stephen M. Bainbridge, *The Board of Directors as a Nexus of Contracts*, 88 IOWA L. REV. 1, n. 25 at 26 (2002)).

57. Lawrence E. Mitchell, *The Sarbanes-Oxley Act and the Reinvention of Corporate Governance?*, 48 VILL. L. REV. 1189, 1191 (2003).

market, reversing the presumably more rational (and economically sound) strategy of allowing the stock market to reflect business—its sales, profits, its cash flows, its investments and its future prospects. To the extent that exposure under [Sarbanes-Oxley] limits if not destroys, the utility of the tools of financial manipulation, corporate managers will find themselves once again required to attend to business. To the extent that rising stock prices are desired, they will have to come from increased profitability, not financial manipulation.⁵⁸

Sarbanes-Oxley raises the bar on attorneys who represent business organizations. In Section 307 of Sarbanes-Oxley, U.S. Congress mandated the “adoption of an up-the-ladder reporting requirement for corporate counsel.”⁵⁹ Sarbanes-Oxley Section 307 Rules of Professional Responsibility for Attorneys states:

Not later than 180 days after the date of enactment of this Act, the [Securities Exchange Commission] shall issue rules, in the public interest and for the protection of investors, setting forth minimum standards of professional conduct for attorneys appearing and practicing before the Commission in any way in the representation of issuers, including a rule—

1. Requiring an attorney to report evidence of a material violation of securities law or breach of fiduciary duty or similar violation by the company or any agent thereof, to the chief legal counsel or the chief executive officer of the company (or the equivalent thereof); and

2. If the counsel or officer does not appropriately respond to the evidence (adopting, as necessary, appropriate remedial measures or sanctions with respect to the violation), requiring the attorney to report the evidence to the audit committee of the board of directors of the issuer or to another committee of the board of directors comprised solely of directors not employed directly or indirectly by the issuer, or to the board of directors.⁶⁰

Section 307 requires that corporate counsel report a “material violation” that the counsel “reasonably believes” has occurred or is tak-

58. *Id.* at 1191-92.

59. Peter J. Henning, *Sarbanes-Oxley Act § 307 and Corporate Counsel: Who Better To Prevent Corporate Crime?*, 8 *BUFF. CRIM. L. REV.* 323, 338 (2004).

60. 15 U.S.C. 7245, § 307 (2002).

ing place to the company's chief legal officer or equivalent, or to the chief legal officer and the company's chief executive officer.⁶¹

In response, the Securities and Exchange Commission instituted in August 2003 an “up-the-ladder” ethical reporting requirements⁶²—The Final Rule for Implementation of Standards of Professional Conduct for Attorneys:

The Securities and Exchange Commission (“Commission”) is adopting a final rule establishing standards of professional conduct for attorneys who appear and practice before the Commission on behalf of issuers. Section 307 of the Sarbanes-Oxley Act of 2002 requires the Commission to prescribe minimum standards of professional conduct for attorneys appearing and practicing before the Commission in any way in the representation of issuers. The standards must include a rule requiring an attorney to report evidence of a material violation of securities laws or breach of fiduciary duty or similar violation by the issuer up-the-ladder within the company to the chief legal counsel or the chief executive officer of the company (or the equivalent thereof); and, if they do not respond appropriately to the evidence, requiring the attorney to report the evidence to the audit committee, another committee of independent directors, or the full board of directors. Proposed Part 205 responds to this directive and is intended to protect investors and increase their confidence in public companies by ensuring that attorneys who work for those companies respond appropriately to evidence of material misconduct⁶³

In *Playing a Dual Role*, Jan L. Handzlik and Stephen J. Connolly summarizes the Final Rule:

The rule applies to all attorneys who “appear and practice before the Commission” in the representation of an issuer of publicly traded securities, but it is having its greatest impact on corporate in-house attorneys. The rule requires in-house as well as outside attorneys to report evidence of a material violation by the company up the ladder to the company's chief executive officer and the board of directors. This is one

61. *Id.*

62. Jan L. Handzlik & Stephen J. Connolly, *Playing a Dual Role*, 26 L.A. LAW., 30-31 (2003).

63. 17 C.F.R. § 205 (2003).

of a series of enactments and policy statements designed to compel corporate counsel to ensure greater accountability on the part of publicly traded companies.⁶⁴

In *Advice for Lawyers: Navigating The New Realm of Federal Regulations of Legal Ethics*, Stephen Fraidin and Laura B. Mutterperl remarked: "A central premise underlying Section 307 and the SEC's implementing rules is that lawyers are, and will continue to be, essential to corporate activity and to the interpretation and implementation of the laws relating to corporate governance and transactions."⁶⁵

Nonetheless, these rules and guidelines contribute little to ethical culture and governance. In *Sarbanes-Oxley Act § 307 and Corporate Counsel: Who is Better to Prevent Corporate Crime?*, Peter J. Henning remarks:

Regardless of the strengths or weaknesses of the up-the-ladder reporting rule, [Sarbanes Oxley Section 307] does not break any new ground. The [Securities and Exchange Commission's (SEC)] position in [*SEC v. National Student Marketing Corp.*⁶⁶] and *In re Carter and Johnson*⁶⁷ has been that lawyers must report wrongdoing by the corporation and its officers to senior officials or, if necessary, the board of directors. Although the American Bar Association (ABA) rules for the profession were not as clear on the subject, after adoption of the Sarbanes-Oxley Act, the ABA amended Model Rule 1.13 in 2003 so that the rule largely incorporates the up-the-ladder reporting requirement. Both regulations reflect what should be the exercise of sound judgment in representing a corporation, that any misconduct by a corporation's agent or officer must be reported to senior management or the organization's highest authority, which is usually the board of directors. Any other response by corporate counsel is improper, and may entail substantial assistance to the wrongdoer that would subject a lawyer to criminal prosecu-

64. Handzlik & Connolly, *supra* note 62, at 30-32.

65. Stephen Fraidin & Laura B. Mutterperl, *Advice for Lawyers: Navigating the New Realm of Federal Regulations of Legal Ethics*, 72 U. CIN. L. REV. 609, 613 (2003).

66. *SEC v. Nat'l Student Mktg Corp.*, 457 F.Supp. 682 (D.D.C. 1978).

67. *In re Carter and Johnson*, 1981 WL 384414 (SEC Rel. No. 34-17597) (1981).

tion and an SEC civil enforcement action. The up-the-ladder reporting rule is a non-event for corporate counsel.⁶⁸

(4) *Limitation of Rules, Guidelines, and Laws in Ethical Culture and Governance at Client-Business Organizations*

Heidi Feldman's earlier caution about the limits of "blackletter" ethical codes to foster good ethical deliberation, equally applies to the Model Rules of Professional Conduct, Sarbanes Oxley Rule 307, the Final Rule, and the Federal Sentencing Guidelines for Organizations.⁶⁹ Federal laws and professional rules are limited in their ability to inspire ethical culture and governance through a stewardship ethic among in-house legal advisors. To further ethical culture and governance, business organizations must compliment compliance rules, guidelines and laws with an institutional moral stewardship, embodied in the in-house legal advisor as simultaneous legal gatekeeper and ethical steward.

2. To True Calling: The In-House Legal Advisor as Simultaneous Legal Advisory Gatekeeper, and Steward for Ethical Culture and Governance

The role of in-house legal advisor must rise to a transcendent calling, rendering holistic legal and ethical advice to the client-business organization. An in-house legal advisor who fails to offer his client-business organization anything short of relevant moral considerations in legal representation may likely undermine the organization's obligation to its shareholders and other stakeholders. The in-house legal advisor should always incorporate, where relevant, moral considerations in legal representation, even when extraordinary leverage and short-term maximization of share price are lawful. Imprudent recklessness engendered by a lack of relevant moral considerations in business decisions endangers not only shareholder value and enterprise viability, but also the business executives' own livelihood, the livelihood of employees, shareholders, and other stakeholders, as well as the stability of our socioeconomic order. Stepping up to a transcendent calling urges the in-house legal advisor toward a stewardship

68. Henning, *supra* note 59, at 340-341.

69. Feldman, *supra* note 42, at 885.

ethic expected in a learned profession. Former American Bar Association President Jerome J. Sherstack remarks:

The word profession comes from the Latin for “to profess,” meaning to make a public dedication to the ideals and practices associated with a learned calling. What then do we profess as lawyers? . . . A professional lawyer is an expert in law pursuing a learned art in service to clients and in the spirit of public service; and engaging in these pursuits as part of a common calling to promote justice and public good. . . . Let’s spell out that declaration . . . that I believe define our calling. . . . First is fidelity to ethics and integrity as a meaningful commitment—in the spirit of enlarging and enhancing the practice, and awareness of, ethics.⁷⁰

An in-house legal advisor’s true calling is inextricably tied to his or her simultaneous duties as legal gatekeeper and steward to deter clients from unethical conduct. In *Corporate Law Practice as a Public Calling*, Robert L. Gordon remarks:

Law is a service profession; but it is also a public profession. Lawyers are supposed to serve their clients faithfully and zealously; but they are supposed to work, both on and off the job as counselors . . . and public servants, to maintain the integrity of the framework of laws, institutions and procedures that constraint their clients’ practices and their own—and not just to maintain that framework, but to help transform it so that it more nearly will approach the conditions of justice and civic community. The law is to function, in [sociologist] Talcott Parson’s words, “as a kind of buffer between the illegitimate desires of his clients and the social interest.”⁷¹

Through his or her simultaneous duties as legal gatekeeper and transcendent ethical steward, an in-house legal advisor can become an invigorated institutional ethical buffer who steers internal decision-makers from unethical considerations in enterprise, strategic, and tactical decisions.

70. Jerome J. Shestack, *Defining Our Calling, Focus on Professionalism Benefits Individuals Lawyers and Justice as a Whole*, 83 A.B.A. J., Sept. 1997, at 8.

71. Robert L. Gordon, *Corporate Law Practice as a Public Calling*, 49 MD. L. REV. 255, 255 (1990).

A. *The Front-Line Ethical Navigator: Stewardship Characteristics of the Invigorated In-House Legal Advisor*

The invigorated in-house legal advisor adopts transcendent characteristics to restore client-business organizations to a position of public trust and global investor confidence. These transcendent characteristics empower the in-house legal advisor—as the client-business organization’s front-line ethical navigator—to steer business leaders from any misconduct that might undermine long-term wealth creation and multiple stakeholder interests.

In *On Character and Servant-Leadership: Ten Characteristics of Effective, Caring Leaders*, Larry Spears highlights several transcendent traits of an effective servant leader. Applied to the ethical culture and governance context particularly in front-line enterprise, strategic and tactical decision-making at client-business organizations, an invigorated in-house legal advisor:

- Is an Effective Listener. The invigorated in-house legal advisor possesses “a deep commitment to listening intently to others.”⁷² A legal advisor intently listens to members of his or her client-organization, regardless of their status or rank in the organization. Ethical issues are often vetted from discussions with lower-ranking members of a client-organization whom the in-house legal advisor interacts. Moreover, the in-house legal advisor is carefully attuned to both verbal language and non-verbal queues. These queues often reveal potential legal, ethical, and integrity issues that require timely intervention.

- Has Empathy. The invigorated in-house legal advisor “strives to understand and empathize with others.”⁷³ Although business leaders might ask the legal gatekeeper to approve high-risk or otherwise questionable business initiatives, the in-house legal advisor will nonetheless empathize with their quest for quick profits and process turnaround, curbing any excessive risks with tactfulness, candor, and ethical foresight.

- Facilitates Healing. The invigorated in-house legal advisor can be an organizational healer who can help executives and other decisionmakers repair dysfunctional business processes that are the source

72. LARRY C. SPEARS, ON CHARACTER AND SERVANT-LEADERSHIP: TEN CHARACTERISTICS OF EFFECTIVE, CARING LEADERS, CONCEPTS & CONNECTIONS 2 (vol. 8, issue 3, 2000).

73. *Id.*

of legal and ethical issues. Dysfunctional business processes often result from poor communication and collaboration between cross-functional business partners with a stake. As a trusted advisor, the in-house legal advisor can tactfully address such issues within the legal representation. In this way, the in-house legal advisor becomes “a powerful force for transformation and integration”.⁷⁴

- **Possesses Awareness.** The invigorated in-house legal advisor is acutely aware. Awareness helps the legal advisor “understand [] issues involving ethics, power, and values”.⁷⁵ Through awareness of what motivates many business executives (e.g., shareholder value, bonuses, not losing face, keeping one’s job), the legal advisor urges the executives to consider the best interests of all stakeholders, not just the executives’ own preoccupations.

- **Possesses Persuasion.** The invigorated in-house legal advisor uses the power of persuasion rather than one’s own positional authority as counsel to the organization. An invigorated legal advisor “seeks to convince others, rather than coerce compliance.”⁷⁶ Executives are more likely to proactively consult a legal advisor if they know that the adviser will hear them out, even on questionable business proposals. At the end of the day, a legal advisor should persuade executives to “Do the Right Thing” profitably within the law and ethical considerations. The invigorated in-house legal advisor never becomes the “ethical legal monster” that hovers, pounces, and coerces executives into compliance.

- **Embraces Conceptualization.** The invigorated in-house legal advisor embraces “broader-based conceptual thinking.”⁷⁷ Rather than permit imprudent, short-sighted business decisions that are likely to yield significant ethical and reputational issues down the line, the invigorated in-house legal advisor sees the big picture, steering executives toward decisions that balance “conceptual thinking[,] a day-to-day operational approach,” and ethical considerations.⁷⁸

- **Demonstrates Foresight.** The invigorated in-house legal advisor possesses “the ability to foresee the likely outcome of a situation.”⁷⁹ For instance, although selling sub-prime mortgages to first-

74. *Id.*

75. *Id.*

76. *Id.*

77. SPEARS, *supra* note 72.

78. *Id.*

79. *Id.*

time home buyers without income or asset verification might not violate any laws, the invigorated legal advisor might foresee the long-term legal, ethical, reputational, and legislative consequences (e.g., regulatory and legislative scrutiny, class action, market implosion, devaluation of shareholder value, loss reputation). Though executives may be blinded by the potential high returns from selling such mortgages on the open market, a legal advisor's stewardship foresight could appeal to the executives' better judgment.

- Embraces Stewardship. The invigorated in-house legal advisor recognizes that she holds the client-business organization in trust for the greater good.⁸⁰ As an officer of the courts, the in-house legal advisor helps her client-organization make ethical decisions that that ensures the public trust and global investor confidence.

- Demonstrates Commitment to the Growth of People. The invigorated in-house legal advisor acknowledges Human Dignity in corporate practice. The invigorated in-house advisor is not merely concerned with enforcing laws, but with helping his advisees embrace their "True North." Accordingly, a legal advisor helps decisionmakers function as moral human beings in the workplace.

- Becomes Committed to Building Community. The invigorated in-house legal advisor views his client-organization as a community of like-minded individuals interested in ensuring "Do the Right Thing" on behalf of all stakeholders.⁸¹

Finally, the invigorated in-house legal advisor cultivates self-knowledge: Self-awareness and unwillingness to compromise her "True North." Through self-awareness of her motivations (e.g., career success, salary, bonuses, not losing face, keeping one's job), the legal advisor remains attune to her "True North" despite any temptations to do otherwise.

B. *The Fearless, Courageous Truth-Teller*

The invigorated in-house legal advisor is a fearless, courageous truth-teller. In his article *The Lawyer as Truth-Teller: Lessons from Enron*, Thomas G. Bost highlights the role of legal advisor as moral truth-teller:

80. *Id.*

81. *Id.*

By definition, the Code and the canons of ethics and rules of professional responsibility upon which it rests set forth minimum standards of conduct. The lawyer conforming to the Code steers as close as possible to the Code's line of permissible conduct in his pursuit of his client's perceived interests. However, as discussed above in connection with the Watkins Investigation, strict adherence to the letter of the Code may not serve either the lawyer or his client particularly well, particularly when the long-term implications of the matter are considered. Rather, the lawyer and his client may be better served if he can determine the "right" thing to do; that is, take the course of action that is not only "right" in the sense of that which is wise and prudent under the circumstances, but "right" in the sense of that which is moral or virtuous.⁸²

What is the primary obstacle that threatens an in-house legal advisor's transformation as a fearless and courageous institutional truth-teller? It is the "Inner Ring." In *The Weight of Glory*, C.S. Lewis describes the "Inner Ring":

[T]here exist . . . two different systems or hierarchies. The one is printed in some little red book and anyone can easily read it up. It also remains constant The Other is not printed anywhere You are never formally and explicitly admitted by anyone. You discover gradually, in almost indefinable ways, that it exists and that you are outside it, and then later, perhaps, that you are inside it From the outside, if you have despaired of getting into it, you call it "that gang" or "they" . . . or the "Inner Ring" I believe that in all men's lives at certain periods, and in many men's lives at all periods between infancy and extreme old age, one of the most dominant elements is the desire to be inside the local Ring and the terror of being left outside."⁸³

At many business organizations, the "Inner Ring" is a hierarchy of influence and power within all levels of an organization that determines who gets:

- Invited into certain informal power networks such as happy hours, power golf outings, and weekend dinner parties;

82. Thomas G. Bost, *The Lawyer as Truth-Teller: Lessons from Enron*, 32 PEPP. L. REV. 505, 514 (2005).

83. C.S. LEWIS, *THE WEIGHT OF GLORY*, 109-111 (2001).

- Invited to more formal power networks including high-exposure roundtables and “high performers” programs;
- Assigned to high-exposure, high-reward business initiatives;
- Mentored and/or sponsored by influential and powerful corporate insiders; and
- Promoted to high-exposure, high-reward positions.

The lure of getting accepted by the “Inner Ring” may become so great that a legal gatekeeper may bite his proverbial tongue when powerful corporate players who control entry into the “Inner Ring” engage in unethical conduct. Likewise, the fear and terror of being “left outside” the “Inner Ring” could have a similar effect including:

- Fear of being deemed a “bad team player” or not “toeing the company line”—especially when addressing a powerful corporate player’s questionable and/or unethical conduct and business practice;
- Fear of being labeled a “whistleblower”;
- Fear of getting excluded from “Inner Ring” informal and formal festivities and processes including golf outings, key meetings, mentorships, sponsorships, and promotions;
- Fear of a lower performance appraisal;
- Fear of losing economic incentives (e.g., salary increases, lateral and vertical promotions, stock options, and bonuses);
- Fear of losing non-economic incentives (e.g., not being recognized as a “high-performing employee,” denied awards and recognition);
- Fear of getting benched, laid off, or terminated;
- Fear of being ostracized and denied career opportunities within the larger corporate and legal community;
- Fear of losing prestige as a practicing in-house attorney or legal compliance advisor; and
- Fear of “alienation”—losing a sense of selfhood and purpose in life.

Quelling these fears requires courage. In *How Important is Courage to the Practice of Law*, Neil Hamilton remarks:

The day-to-day practice in this phase of our profession’s history rarely requires heroic courage because of physical threat, rather it requires the day-to-day courage of forgoing possible monetary gain by turning down some representation and resigning from others if necessary, by being candid with clients, by being candid with professional peers about improper conduct and by properly keeping in balance the lawyer’s

roles as a representative of clients, an officer of the legal system, and a public citizen having special responsibility for the quality of justice.⁸⁴

The invigorated in-house legal advisor must remain vigilant despite the “Inner Ring’s” incessant lure and incipient fears. Over the course of a career, the in-house legal advisor may encounter internal decisionmakers whose zeal for short-term maximization of share price overrides morality and fair dealing—challenging the in-house legal advisor’s roles as technical legal counselor, business enabler, and ethical steward. In such instance, how should the in-house legal advisor confront the ethically-challenged yet powerful decisionmaker as well as the existential fears of being a truth-teller?

The invigorated in-house legal advisor has several options:

The “True North”/Moral Solidarity Test: The in-house legal advisor could appeal to the decisionmaker’s own “True North,” encouraging the executive to stand in both the organization’s shoes and the executive’s own shirt:

- If we proceed with this strategy, could the organization lose its shirt through eight-figure regulatory fines and sanctions, including the inability to acquire or merge with other business organizations?
- Could you lose your shirt—get terminated, pay millions in fines, or even go to prison?
- Could the organization become insolvent and possibly go out of business, undermining both shareholder and other shareholder interests?

This approach addresses both potential ethical conduct and preserves the in-house legal advisor’s social capital as a trusted advisor to business organizations and their leaders.

The Smell/Newspaper Test: The in-house legal advisor could advise the decisionmaker to consider the Newspaper Test or Smell Test. The Smell Test is a reputational risk management decision-making approach that helps an executive assess:

- How far-reaching are my business decisions?
- Are my actions legal?

84. Neil Hamilton, *How Important is Courage to the Practice of Law*, MINN. LAW., Aug. 7, 1999, at A-7.

- If legal, are my actions consistent with the company and my own internal True North?
- If legal, are the actions consistent with how employees, regulators, consumers, and the general public might react?
- If I take action, how will I feel later? Will I feel comfortable should my hometown newspaper or the *Wall Street Journal* publish my exploits?
- If I take action, what will others think? What will my colleagues think?
- If my actions are wrong, what will be the criminal, civil and reputational consequences once my actions are discovered?

Like the “True North”/Moral Solidarity Test, the Smell/Newspaper Test addresses potential ethical conduct while preserving the in-house legal advisor’s social capital as a trusted advisor. Without question, the in-house legal advisor should always approach both tests with tact and professional discretion.

The Mother Test: The in-house legal advisor could advise the decisionmaker to consider the Mother Test. The Mother Test is a personal values assessment that helps the executive assess:

- What will my mother, father, or guardian think?
- How will my decision, if deemed improper, impact my significant others (e.g., my spouse, siblings, children, and personal friends)?
- Do my actions reflect the values that my parents taught me? Do my actions conflict with the moral values learned in childhood from my parents?

In this case, the in-house legal advisor should have some previous personal and/or professional rapport with the targeted decisionmaker to tactfully discuss these more personal moral considerations. Accordingly, the legal advisor should approach the decisionmaker in a more private professional setting, not a conference meeting or conference call. Like the “True North”/Moral Solidarity Test and the Smell/Newspaper Test, the Mother Test also preserves the in-house legal advisor’s social capital as a trusted advisor.

Formal Corporate Escalation: When the “True North”/Moral Solidarity Test, Smell/Newspaper Test, and the Mother Test have failed to sufficiently hedge a decisionmaker’s unethical conduct, the in-house legal advisor could—as a more formal approach under Model Rule 1.13(b)—escalate the matter to a higher authority

within the organization.⁸⁵ If the in-house legal advisor provides counsel on a matter that falls within the scope of a “material violation of securities law or breach of fiduciary duty or similar violation by the company,”⁸⁶ the advisor must report relevant evidence to the:

- Client-organization’s chief legal counsel, chief executive officer, or equivalent; or
- Audit committee of the board of directors, another committee of the board of directors comprised solely of outside directors, or to the board of directors, provided the chief legal counsel or chief executive officer fails to appropriately adopt when necessary appropriate remedial measures or sanctions.⁸⁷

Worst-case Scenario: After exhausting all available options to address potentially unethical conduct, the in-house legal advisor might conclude that the client-business organization has failed to operationalize “Do the Right Thing.” In this extreme case, the in-house legal advisor has to make a hard decision: whether to move forward, possibly acquiesce and attend to other matters as legal gatekeeper, letting the potentially unethical matter take its course (which may haunt and negatively impact the legal advisor later), or to discontinue her employment, seeking livelihood elsewhere.

Across American banking institutions, business executives embarked upon a lucrative business strategy to market sub-prime mortgages and adjustable rate mortgages (ARMs) to sub-prime consumers and other consumers with no verifiable source of income. These mortgages often carried potential loss rates exceeding 40% but with a significant short-term windfall. To offset potential losses, banks immediately sold newly-acquired mortgages on the secondary market at extraordinary profits.

An invigorated in-house legal advisor as fearless truth-teller to a client-bank could have set aside existential fears, mustering courage to go beyond her legal technician role to advise the decisionmaker to consider the following:

- Although it is not illegal to sell ARMs and subprime mortgages to sub-prime consumers, could an extensive exposé in the *Wall Street Journal* after a possible market implosion of a high-

85. MODEL RULES OF PROF'L CONDUCT R. 1.13(b).

86. As highlighted in Sarbanes-Oxley Act of 2002 Section 307 and the related SEC Final Rule.

87. 17 C.F.R. pt. 205 (2009).

risk business model undermine bank assets, shareholder value, and reputational standing?

- Though this profit model makes sense in an immediate economic sense, does the long-term ethical and reputational consequences expose the company to lost reputation as well as regulatory, criminal, and civil scrutiny related to executives' failure to fulfill fiduciary duties?

Thomas G. Bost remarked:

[T]he lawyer's principled determination to take the moral or virtuous course in all circumstances may give him the courage and strength to withstand client, professional or societal pressures to pursue a course of action that appears to be expedient at the moment but may be revealed over time not to have been wise or appropriate.⁸⁸

This approach embodies the invigorated in-house legal advisor as fearless truth-teller, urging client-business organizations to "Do the Right Thing." One caution: The legal advisor as truth-teller is not the pejorative tattletaler/whistleblower. Rather, such a counsel is a trusted advisor, team player, and accountability partner. For this accountability partnership between the in-house legal advisor and internal decisionmakers to function with integrity, a tacit agreement must exist between the legal advisor and his client cohorts. The in-house legal advisor will be a trusted advisor to individual decisionmakers as long as the advisees adhere to both law and ethical behavior. At the end of the day, the in-house legal advisor represents the client-business organization itself, not individual decision makers. The in-house legal advisor has an ultimate obligation to the organization itself under Model Rule 1.13(a).

3. Toward Moral Ministry in In-House Corporate Legal Representation

The invigorated in-house legal advisor as transcendent ethical steward represents a shift from 21st Century failures toward restoration of public trust in business organizations. In effect, the in-house legal advisor as transcendent ethical steward becomes a secular moral minister in corporate practice, answering to a higher moral calling in corporate legal practice.

88. Bost, *supra* note 82, at 514.

In *The Lawyer's Calling: Christian Faith and Legal Practice*, Joseph G. Allegratti remarks:

[T]he Code [Law] cannot be the sole guide to the moral life. The lawyer is not an amoral technician or a hired gun. He cannot avoid moral responsibility for his actions by appealing to the Code or to his professional role ('Gee, I was only doing my job'). He is a moral agent whose actions have consequences for which he is accountable, not just to himself and to others, but ultimately to God.⁸⁹

Being a moral agent does not require religiosity or overt spiritual ritual. It does, however, require that the moral agent—in all business and legal deliberations—consider Human Dignity: “[T]he status of human beings entitling them to respect . . . that they are a presupposition for value.”⁹⁰ The invigorated in-house legal advisor helps business executives become hyperconscious of the interplay between business decisions, legal requirements, moral values, and shareholder value/wealth creation and their collective impact on human dignity, livelihood, and stability of employees, shareholders, other stakeholders, and society at large. The invigorated in-house legal advisor as internal moral minister counsels business executives to adhere to both personal and collective moral obligations, even amidst short-term losses. Based on the author’s experience, the invigorated in-house legal advisor can help business executives find creative yet morally-acceptable ways to avert short-term losses toward sustainable long-term shareholder value.

In effect, the invigorated in-house legal advisor instills moral ministry in her corporate business legal practice—fashioning legal skills and ethical stewardship toward long-term wealth creation, public trust, and investor confidence on behalf of all stakeholders and the larger social contract.

4. Conclusion

To atone for 21st Century moral failures and lost public trust, business organizations must invigorate the role of in-house legal advi-

89. JOSEPH G. ALLEGRETTI, *THE LAWYER'S CALLING: CHRISTIAN FAITH AND LEGAL PRACTICE* 21 (1996).

90. Mette Lebeck, *What is Human Dignity?*, http://eprints.nuim.ie/392/1/Human_Dignity.pdf (last visited Nov. 4, 2009).

sor from “mere legal technician” into that of simultaneous legal advisory gatekeeper and ethical steward within corporate legal representation. To become a simultaneous legal gatekeeper and ethical steward, the in-house legal advisor must develop transcendent characteristics, namely:

- Demonstrating effective listening to members of the client-business organization;
- Showing empathy, even to organizational leaders who might approach with high-risk and/or questionable business strategies;
- Being an organizational healer who helps executive and business units repair broken processes that often breed ethical issues;
- Being acutely aware of what motivates business executives and staff members, to direct them to “Do the Right Thing” despite any temptations to do otherwise;
- Convincing others tactfully and persuasively to “Do the Right Thing” without becoming an “ethical legal monster”;
- Engaging in broad-based conceptual thinking to help executives incorporate legal and ethical considerations in both big-picture and day-to-day operations;
- Executing ethical foresight—the ability to foresee the likely outcome of a situation by considering long-term ethical, reputational, and economic issues;
- Embracing Stewardship: Recognizing that the in-house legal advisor holds her client-business organization in trust for the greater good, helping the organization make decisions that maintain economic stability for both the organization and society at large;
- Demonstrating commitment to the growth of individuals, acknowledging Human Dignity, and helping others function as moral human beings in the workplace;
- Building a community of like-minded individuals interested in ensuring “Do the Right Thing” on behalf of all stakeholders;
- Becoming a fearless, courageous Truth-Teller to client decisionmakers, despite any fears and temptations to do otherwise; and
- Discovering and embracing transcendent ethical stewardship and moral ministry, helping business executives find creative yet morally acceptable ways to achieve and sustain long-term wealth creation.

Doing so invigorates the role of the in-house legal advisor as simultaneous legal advisory gatekeeper and ethical steward toward a

more dynamic, enterprising role creating and reinforcing ethical culture and governance at client-business organizations.

